

ORDER E-FILED 9/15/2008

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
RICHARD MARMARO (Cal. Bar No. 91387)
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
Telephone: (213) 687-5000
Facsimile: (213) 687-5600
Email: rmarmaro@skadden.com

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
JAMES E. LYONS (Cal. Bar No. 112582)
TIMOTHY A. MILLER (Cal. Bar No. 154744)
Four Embarcadero Center, Suite 3800
San Francisco, California 94111-4144
Telephone: (415) 984-6400
Facsimile: (415) 984-2698 (fax)
Email: jlyons@skadden.com
tmiller@skadden.com

Attorneys for Non-Parties Skadden, Arps, Slate, Meagher & Flom LLP
and Individual Skadden Attorneys

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

KENNETH L. SCHROEDER,

Defendant.

CASE NO. C 07-3798-JW (HRL)

**STIPULATION AND ~~PROPOSED~~
ORDER RE MOTION OF KENNETH L.
SCHROEDER TO COMPEL FURTHER
RESPONSES TO DISCOVERY
REQUESTS (TESTIMONY AND
DOCUMENTS) BY (1) KLA-TENCOR
CORPORATION AND (2) SKADDEN,
ARPS, SLATE, MEAGHER & FLOM
LLP, ATTORNEYS FOR THE SPECIAL
COMMITTEE OF KLA'S BOARD OF
DIRECTORS [DKT. NO. 75]**

(MODIFIED BY THE COURT)

Date: September 23, 2008

Time: 10:00 a.m.

Courtroom: 8

Judge: Magistrate Judge Howard R. Lloyd

1 WHEREAS, Defendant Kenneth L. Schroeder ("Schroeder") issued subpoenas to non-
2 parties Skadden, Arps, Slate, Meagher & Flom LLP and individual Skadden attorneys Galen
3 Bellamy, Jack DiCanio, Zvi Gabbay, Elizabeth Harlan, Victoria Holstein-Childress, Cale Keable,
4 Morgan Lopez, Richard Marmaro, Thomas McDonald, Lanelle Meidan, Jonah Van Zandt and
5 Sheryl Wu (collectively, "Skadden"), and separately to non-party KLA-Tencor Corporation
6 ("KLA"); and

7 WHEREAS, Skadden and KLA timely objected to the subpoenas in part on the ground that
8 they called for the production of documents and information protected from disclosure by the
9 attorney work product doctrine; and

10 WHEREAS, Skadden, KLA and Schroeder engaged in a "meet and confer" process to
11 resolve their disputes, but were ultimately unsuccessful; and

12 WHEREAS, on June 9, 2008, Schroeder filed his Motion of Kenneth L. Schroeder to
13 Compel Further Responses to Discovery Requests (Testimony and Documents) By (1) KLA-
14 Tencor Corporation and (2) Skadden, Arps, Slate, Meagher & Flom LLP, Attorneys for the Special
15 Committee of KLA's Board of Directors (the "Motion to Compel") (Dkt. No. 75), originally setting
16 the Motion to Compel for hearing on July 15, 2008, and later, at the request of KLA and Skadden,
17 continuing the hearing to August 26, 2008; and

18 WHEREAS, at the request of KLA and Skadden, the parties filed a stipulation dated July
19 25, 2008 (Dkt. No. 81) setting forth a proposed briefing schedule and continuing the hearing on the
20 Motion to Compel to September 9, 2008, and, based on the Court's order on that stipulation dated
21 August 1, 2008 (Dkt. No. 83), a schedule was set for the completion of briefing on the Motion to
22 Compel and the hearing on the Motion to Compel was continued to September 23, 2008, at 10:00
23 a.m.; and

24 WHEREAS, on August 1, 2008, Skadden filed its opposition to Schroeder's Motion to
25 Compel, arguing principally that the documents and information sought in Schroeder's subpoenas
26 were protected from disclosure by the attorney work product doctrine (Dkt. No. 84, and related
27 entries); and

28

1 WHEREAS, on August 26, 2008, Schroeder filed his reply brief in support of his Motion to
2 Compel (the "Schroeder Reply") (Dkt. No. 89) in which he argues, in part, that "the Court need not
3 even consider any of Skadden's arguments concerning work product protection," citing cases
4 including *In re California Public Utilities Commission*, 892 F.2d 778, 781 (9th Cir. 1989)
5 (hereinafter "*CPUC*") (*see* Schroeder's Reply (Dkt. 89) at page 17 line 1 through page 18 line 8);
6 and

7 WHEREAS, Skadden contends that Schroeder's argument based on *CPUC* and related
8 cases was not raised by Schroeder in the "meet and confer" process or at any point prior to the
9 filing of Schroeder's Reply; and

10 WHEREAS, after receiving Schroeder's Reply, Skadden contacted counsel for Schroeder
11 and requested that Schroeder agree, in light of Schroeder's *CPUC* argument, to continue the
12 hearing on the Motion to Compel to permit Skadden to move for a protective order prohibiting the
13 disclosure of documents or information sought in the Motion to Compel that Skadden claims are
14 protected from disclosure by the attorney work product doctrine; and

15 WHEREAS, Schroeder's counsel explained to Skadden that Schroeder does not wish to
16 continue the hearing on the Motion to Compel, but would instead agree that Skadden may file a
17 surreply in further opposition to Schroeder's Motion to Compel, not to exceed five pages, by
18 Tuesday, September 16, 2008, limited to responding to the arguments raised by Schroeder at page
19 17 line 1 through page 18 line 8 of Schroeder's Reply (Dkt. No. 89); and

20 WHEREAS, in consideration of Skadden's agreement to proceed by filing a surreply
21 rather than filing an administrative motion for an order continuing the hearing date, Schroeder has
22 further agreed that (i) he has not contended, in his Reply or elsewhere, and will not contend that
23 Skadden's arguments under the attorney work product doctrine in its opposition papers or its
24 surreply have been compromised or affected in any way by the fact that Skadden did not file a
25 motion for a protective order, and (ii) to expedite the final resolution of the dispute between
26 Skadden and Schroeder, if the Court finds that the filing of a motion for protective order by
27 Skadden or KLA (or both) is appropriate or necessary in light of Schroeder's *CPUC* argument,
28 Skadden's opposition papers and surreply should be deemed by the Court to constitute a motion for

1 protective order under Rule 26(c) and Rule 45(c) of the Federal Rules of Civil Procedure
2 prohibiting the disclosure of the documents and information sought in Schroeder's Motion to
3 Compel that Skadden contends are protected from disclosure by the attorney work product
4 doctrine; and

5 WHEREAS, to induce Skadden not to file an administrative motion seeking a continuance
6 of the hearing date, Schroeder and Skadden have further agreed that, if after reviewing the briefs of
7 the parties, including Skadden's surreply, and after hearing argument on September 23, 2008, the
8 Court determines that it cannot deny the Motion to Compel or issue a protective order under Rule
9 26(c) or Rule 45(c) of the Federal Rules of Civil Procedure prohibiting the disclosure of the
10 documents and information sought in Schroeder's Motion to Compel that Skadden or KLA
11 contends are protected from disclosure by the attorney work product doctrine without the filing of a
12 new motion for protective order by Skadden or KLA (or both), then the Court should defer its
13 ruling on Schroeder's Motion to Compel to permit Skadden and/or KLA to move the court for a
14 protective order, so that the Court can address the issue with the benefit of full briefing;

15 WHEREAS, to the extent that KLA, in its opposition to Schroeder's Motion to Compel, has
16 asserted work product objections with respect to certain of the documents and information sought
17 in Schroeder's separate subpoena to KLA, KLA agrees with and joins Skadden's positions set forth
18 above;

19 IT IS HEREBY STIPULATED AND AGREED, by and between Schroeder, Skadden and
20 KLA through their respective counsel, as follows:

21 1. Skadden may file a surreply in further opposition to Schroeder's Motion to
22 Compel not to exceed five pages, limited to responding to the arguments raised by Schroeder at
23 page 17 line 1 through page 18 line 8 of Schroeder's Reply (Dkt. No. 89).

24 2. Skadden's surreply shall be filed no later than Tuesday, September 16, 2008.

25 3. The hearing on the Motion to Compel shall go forward as scheduled on
26 September 23, 2008.

27 4. Skadden's and KLA's objections based on the applicability of the attorney
28 work product doctrine to the production of documents or information requested in Schroeder's

1 DATED: September 12, 2008

DLA PIPER US LLP
SHIRLI FABBRI WEISS
DAVID A. PRIEBE
JEFFREY B. COOPERSMITH
By: _____/s/_____
Jeffrey B. Coopersmith
200 University Avenue
East Palo Alto, California 94303
Telephone: (650) 833-2096
Facsimile: (650) 833-2001
Attorneys for Defendant Kenneth L. Schroeder

9 DATED: September 12, 2008

MORGAN, LEWIS & BOCKIUS LLP
JOHN H. HEMANN
JOSEPH E. FLOREN
By: _____/s/_____
Joseph E. Floren
One Market Street, Spear Street Tower
San Francisco, CA 94105-1126
Telephone: (415) 442-1000
Facsimile: (415) 442-1001
Attorneys for Non-Party KLA-Tencor Corporation

ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED. **Skadden's surreply shall be filed no later than 5:00 p.m. on September 16, 2008.**

22 Dated: September 15, 2008



The Honorable Howard R. Lloyd
United States Magistrate Judge